

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 226
3022073

BETWEEN KATHLEEN HODSON
 Applicant

AND LI AND FENG LIMITED trading
 as TAWA VILLAGE BAKERY
 Respondent

Member of Authority: Michele Ryan

Representatives: Alex Kersjes, Advocate for Applicant
 May Moncur, Advocate for Respondent

Investigation Meeting: 5 October 2018

Submissions Received: Oral submissions on the day of the investigation from both
 parties.

Determination: 15 April 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Ms Kathleen (Kate) Hodson began her employment with Li and Feng Limited, trading as Tawa Village Bakery (the Bakery), on 17 June 2017. Her employment was said to be subject to a 90 day trial period provision. She was dismissed 4 weeks later.

[2] Ms Hodson began work at 9:30 a.m. on Friday, 14 July 2017. Half an hour earlier the suburb of Tawa experienced a power outage as a result of a weather event. Homes and businesses in the area were affected, including the Bakery.

[3] It is common ground that there was little for staff to do while the power was out. The Bakery was unable to produce hot food or drink, there were few customers,

and it was cold and dark. At 10:45 a.m. (or thereabouts) Mr Muyuan Li, the owner of the Bakery, told all four employees to go home. He advised if power was restored before 1:00 p.m. they were expected to return to work. He would contact each of them in that event. Ms Hodson left shortly after when her partner arrived to pick her up. Power was restored to the Bakery within 5-10 minutes (or thereabouts) after staff had left the Bakery.

[4] At approximately 11.23 a.m. Ms Hodson realised she had missed several calls from Mr Li and that he had sent her a text message at 11.18 a.m. asking her to return to work.

[5] The pair then exchanged the following text messages:

Ms HODSON:	Hey ive just gotten into town and unable to make it back, Sorry lee...
Mr. LI:	no, if you not come back today you don't need back again
Ms HODSON:	Sorry what do you mean if I don't come back?
Mr. LI:	I mean if you can't, i can't. thanks
Ms. HODSON:	Sorry I can't make it back today
Mr. LI:	i will pay for your travel cost
Mr. LI:	bring your uniform back tomorrow, today is your last day thanks

[6] Ms Hodson did not return to work. Ms Hodson says her dismissal was unjustified and seeks corresponding remedies. The Bakery says Ms Hodson was dismissed pursuant to a contractual trial period provision and the dismissal was justifiable.

The Authority's investigation

[7] Ms Hodson gave written and oral evidence to the Authority. On behalf of the Bakery, Mr Li provided evidence as did Ms Rachel Moore and Mr Jason Hu, who were both present at the Bakery on the morning of the power outage.

[8] This determination has made findings of fact and law necessary to dispose of Ms Hodson's claims have been made. As is permitted by s 174 of the Employment Relations Act 2000 ("the Act") I have not referred to each item of evidence or every aspect of submissions furnished to the Authority over the course of the investigation,

but all information received has been carefully considered. This determination has been issued outside the timeframe set out at s 174C(3)(b). The Chief of the Authority has decided exceptional circumstances existed as providing cause for the delay.¹

The issues

[9] The Authority is required to determine:

- (a) whether Ms Hodson was an existing employee when she agreed to the trial period provision;
- (b) whether the trial period provision set out in the employment agreement between the parties complied with the law as it concerns trial periods;
- (c) if the agreement to a trial period was not in accordance with the law, was Ms Hodson's dismissal justifiable, both substantively and procedurally;
- (d) if Ms Hodson was dismissed unjustifiably should remedies be awarded.

Did Ms Hodson work for the Bakery before she received an employment agreement

[10] Ms Hodson sought to establish she had worked for the Bakery before she agreed to the trial period. Her challenge on this point is because a trial period (pursuant to the Employment Relations Act 2000, - "the Act") cannot be subsequently lawfully agreed after an employee has commenced employment.²

[11] The parties agree Ms Hodson's was initially interviewed by Mr Li on 8 June 2017. In her written statement Ms Hodson says at the end of the interview Mr Li requested she return to the bakery for a brief trial on Saturday 10 June 2017.

[12] Mr Li disputes Ms Hodson's account. He says terms of employment were largely concluded during the interview held on 8 June 2017. He notes he had agreed to Ms Hodson's request for 30 hours per week whereas the role was initially planned as part-time at 20 hours per week. Mr Li says after recording her hours of work, hourly rate, and commencement date in an employment agreement, she was given the document with an attached letter to take home and consider. I shall return to the content of that written material later in this determination. On behalf of the bakery,

¹ Employment Relations Act 2000, s 174C(4)

² *Smith v Stokes Valley Pharmacy Ltd* [2010] NZEmpC 111

the letter given to Ms Hodson, is recorded as being signed on 8 June 2017. This tends to suggest the employment agreement was given to her on that date.

[13] Ms Hodson says when she returned to the Bakery on 10 June 2017 she cleaned dishes and was shown how to work the till and worked as a normal employee. I have not been persuaded Ms Hodson was made to work as she attests.

[14] There is an inconsistency between her statement of problem which records she worked for a day at the bakery compared to a written statement of evidence which advises she worked for 2 ½ hours. During the Authority's meeting Ms Hodson conceded she was "*probably there [at the Bakery] for about an hour*".

[15] I consider it more likely that Ms Hodson observed the use of the till system and volunteered to clean dishes to demonstrate willing, while waiting to speak to Mr Li and finalise terms and conditions of employment and to be assigned uniforms. Importantly, she accepts she was not asked by the Bakery to perform any particular functions and agreed she not asked to be paid.

[16] I am unwilling to conclude her activities can be fairly characterised as work as an employee, where Ms Hodson has not established there was a requirement to work or an expectation for payment of wages in return. Ms Hodson was not an existing employee at the point in time in which she accepted the terms and conditions set out in her employment agreement.

Was there a valid trial period agreement between the parties?

[17] There are, however, two reasons by which I find the Bakery is unable to rely on a trial period provision.

[18] The first concerns the documentation between the parties regarding the trial period provision. Whilst I am satisfied Ms Hodson was given a copy of the proposed employment agreement that contained a trial period provision, there is no evidence that Ms Hodson signed the employment agreement. What she did sign, as did the Bakery, is the additional letter which appears to have been attached to the employment agreement.

[19] Amongst other things, the letter informed Ms Hodson that the Bakery was pleased to provide her with the opportunity to consider the terms and conditions that

relate to the position and that the position was subject to a trial period of 90 days. The asked Ms Hodson to sign and date a declaration section at the bottom of the document and return it once she had read and understood it.

[20] The declaration portion of the letter states the following:

I have read and understand this letter and acknowledge this is not an offer of employment but an opportunity to consider a possible employment agreement. I have been advised that I am entitled to seek independent advice about this employment agreement.

[21] Ms Hodson signed and dated the declaration section.

[22] When questioned at the Authority's investigation, Ms Hodson was unsure about her understanding as to the nature of letter attached to the employment agreement. This is perhaps explainable where she did not seek advice on the matter.

[23] For the Bakery, I have no doubt Mr Li and Ms Feng sought to ensure the Bakery's employment agreements are legally compliant but, where English is a second language for each of them, I consider it likely they have misunderstood the content and effect of the letter.

[24] There is nothing in that document which sets out that the execution of it establishes agreement between the parties to terms of employment. In fact the letter records quite the opposite. It follows that Ms Hodson's signature on the letter does not reflect an agreement to the terms contained in the employment agreement.

[25] I accept the Bakery may perceive the distinction is irrelevant where Ms Hodson accepts she understood her employment was subject to a trial period. However, the Employment Court has it clear that the requirements of the trial period provisions, set out at s 67A and s 67B of the Act, must be interpreted strictly where previous employee statutory rights have been limited.³ In *Blackmore v Honick Properties Limited*, former Chief Judge Colgan observed that, in exchange for the advantage received under the statutory trial period provisions, employers must get the paper work right.⁴ He went on to note:

What this means in practice is that employers wishing to avail themselves of the opportunities afforded by ss 67A and 67B **must ensure that trial**

³ Above n2 at [48]

⁴ [2011] NZEmpC 152 at [66]

periods are mutually agreed in writing before a prospective employee becomes an employee. ...

[26] The Bakery has not been able to demonstrate the trial period was mutually agreed in writing between the parties. I need to note that the failure to have Ms Hodson sign the employment agreement does not invalidate the remaining terms of employment between them, but the obligation that the parties agree to the trial period “in writing” means the trial period provision within the employment agreement is unenforceable.

[27] In any event, even if Ms Hodson had signed the employment agreement I would have to conclude the Bakery could not rely on it. This is because cl. 17 1 of the employment agreement provided that the termination of the employment agreement required “*one weeks’ notice in writing*” by either party.

[28] Where an employer seeks to terminate employment under a trial period provision, s 67B(1) of the Act states the employer may do so “*by giving the employee notice of the termination ...*”. In *Smith v Stokes Valley Pharmacy Ltd* the Court interpreted “notice” in any particular case, as meaning whatever the parties had contractually agreed on the matter.⁵ The effect is that an employer must give notice in accordance with the parties’ contractual agreement regarding notice.

[29] Mr Li properly conceded on behalf of the Bakery that Ms Hodson’s employment was terminated summarily and she was not given one weeks’ notice in writing. Because the Bakery did not comply with its own terms regarding notice on termination, the dismissal did not comply with s 67B.

[30] I have found the trial period provision in Ms Hodson’s employment agreement was not valid. The trial period was not agreed in writing, nor was the dismissal compliant with the procedure required by s 67B. Ms Hodson’s personal grievance regarding her dismissal may be investigated and determined by the Authority.

Was the dismissal justified?

[31] The Authority is required to objectively assess whether the Bakery’s actions and how the Bakery acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The inquiry involves an

⁵ Above n2

examination not only as to whether there were reasonable grounds on which to dismiss but also the process taken by the Bakery when it dismissed Ms Hodson.

[32] Section 103A(3) sets out a range of procedural matters the Authority must consider when undertaking its assessment. These include, amongst other things whether the employer raised its concerns with the employee, whether the employee was given an opportunity to respond to the concerns and whether the employer genuinely considered any explanation proffered.

[33] Ms Hodson accepts she did not return to work. Without a satisfactory explanation as to why she did not, her conduct may have provided a substantive ground on which the Bakery could justifiably dismiss. The difficulty in this case is that the Bakery made no inquiry with Ms Hodson on that matter nor did it provide her with an opportunity to comment on its decision to terminate her employment before she was dismissed. These procedural failings cannot be regarded as minor. At a minimum an employer is statutorily obliged to provide an employee an opportunity to comment on the employer's concern, particularly where it is contemplating dismissal.⁶ The possibility that an employee may not have an acceptable explanation in response to an employer's concerns does not lessen the obligation.

[34] Where no process was followed by the Bakery I must find Ms Hodson's dismissal was unjustified.

Remedies

[35] Where the Authority determines an employee has a personal grievance it may provide, amongst other things, the following remedies; reimbursement of the whole or any part of wages or any other money lost by the employee as a result of the grievance, and compensation for humiliation, loss of dignity, and injury to feelings. When the grievance has resulted in lost wages s 128(2) requires the Authority to order the payment of a sum equal to the lesser of the sum actually lost or 3 months' ordinary time remuneration.

Lost wages

[36] Ms Hodson seeks payment of 13 weeks' lost wages.

⁶ Employment Relations Act, s 4(1A)

[37] I am satisfied she attempted to mitigate her loss of wages by looking for alternative work. She provided evidence of several job applications and workplace assistance from Work and Income New Zealand. She found part time work in February 2018 and has since become a student. Subject to an assessment regarding contribution I consider it appropriate to order reimbursement of wages lost for the 13 week period following her dismissal.

Compensation

[38] Ms Hodson claims \$10,000 as compensation for humiliation, loss of dignity and injury to feelings. She attended counselling following her dismissal but the evidence provided to the Authority demonstrates she did not seek access those services until December 2017 - almost 5 months after her dismissal had passed. Ms Hodson disclosed some domestic issues to the Authority which do not need to be recorded, but I am not persuaded the effect of her dismissal was a factor that led to her subsequent health concerns and treatment.

[39] Overall, the evidence to support her claim for compensation was not strong but I accept she felt some distress and humiliation by her dismissal. Also subject to an assessment as to contribution, I consider \$4,000 as compensation is appropriate.

Contribution

[40] Section 124 requires the Authority to consider the extent to which an employee's actions contributed to the situation that gave rise to the personal grievance. If those actions so require, reduce the remedies that would otherwise have been awarded.

[41] The crux of Ms Hodson's her claim is that she had not been informed she would be required to return to work if the power was restored. When questioned she said she didn't remember Mr Li advising staff of the requirement. The evidence of Ms Moore and Mr Hu, neither of which are now employed by the Bakery and are unlikely to have any personal interest in the matter, was, in contrast, much more persuasive. Both said the notification to return to work if power resumed was conveyed by Mr Li in the same sentence and immediately after suggesting staff go home. It is difficult to understand how Ms Hodson could have missed this material piece of information when Mr Li's offer was clearly qualified. She later accepted she "*might not have paying attention*".

[42] Ms Hodson evidence as to why she did not return to work is also questionable. She says when she accompanied her partner to the central city she did not have her wallet with her and was unable to pay for return transport to Tawa. In any event she says she was unfamiliar with Wellington's public transport system. She was unable to provide a plausible explanation as to why she did not convey these impediments to Mr Li. It is further notable she did not volunteer any reason as to why she could not return to work, including that she was unaware of the possibility she may be expected to do so, over the course of her messaging with Mr Li on 14 July 2017.

[43] Whether Ms Hodson was unwilling or unable to return to the Bakery, I find her casual manner, both regarding the arrangement on which she left the Bakery and her failure to properly communicate with Mr Li when asked to return, was imprudent. She must bear some responsibility for her approach to the circumstances that transpired on 14 July 2017. I find her actions contributed significantly to the situation that led to her dismissal. Accordingly I consider it appropriate to accordingly reduce orders made for wages and compensation by 50 percent.

Orders

[44] Li and Feng Ltd trading as Tawa Village Bakery is ordered to pay Ms Kathleen Hodson the following;

- (a) \$3071.25 (the sum equal to 13 weeks' lost wages minus 50% to reflect contribution) lost wages or work performed on 4 August 2017, and
- (b) \$2,000 as compensation pursuant to s 123(1)(c)(i) of the Act.

Costs

[45] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority